INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:	
Alberty v. *United States*, 159 F. 2d 278	8
Boyd v. *United States*, 116 U. S. 616	10
Clark Distilling Co. v. *Western Maryland Ry. Co.*, 242 U. S. 311	11
Hipolite Egg Co. v. *United States*, 220 U. S. 45	6, 8, 9
McDermott v. *Wisconsin*, 228 U. S. 115	9
Murray's Lessee v. *Hoboken Land and Improvement Co.*, 18 How. 272	10
Sullivan v. *United States*, 161 F. 2d 629, certiorari pending, No. 121, this Term	8
United States v. *Phelps Dodge Mercantile Co.*, 157 F. 2d 453, certiorari denied February 10, 1947. No. 812, O. T. 1946	8
West Coast Hotel Co. v. *Parrish*, 300 U. S. 379	11
Ziffrin, Inc. v. *Reeves*, 308 U. S. 132	10
Statutes:	
Federal Food, Drug and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301.:	
Sec. 201 (h)	2, 6
Sec. 201 (m)	2
Sec. 304 (a)	2
Sec. 304 (b)	3
Sec. 502 (a)	3, 6
Pure Food and Drug Act of 1906, Sec. 10, 34 Stat. 768,771	8

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 230

WILLIAM R. OLSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 146–150) is reported at 161 F. 2d 669. The opinion of the district court (R. 23–24) is reported at 66 F. Supp. 754.

JURISDICTION

The judgment of the circuit court of appeals was entered May 15, 1947 (R. 150). The petition for a writ of certiorari was filed July 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a device misbranded when introduced in interstate commerce in violation of the Federal Food, Drug, and Cosmetic Act may be seized by judicial process from the home of the purchaser in a condemnation proceeding under Section 304 of the act.

STATUTE INVOLVED

The pertinent provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301, are as follows:

* * * * *

SEC. 201. For the purposes of this Act—

* * * * *

(h) The term "device" * * * means instruments, apparatus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

* * * * *

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of the containers or wrappers, or (2) accompanying such article.

* * * * *

SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or

misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. * * *

SEC. 502. A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

* * * * *

STATEMENT

In July 1945, the United States filed a libel of information, pursuant to Section 304 of the Federal Food, Drug and Cosmetic Act, in the United States District Court for the District of Oregon for the seizure and condemnation of a device designated as a Spectro-Chrome, which had been transported in interstate commerce from Newfield, New Jersey, to Portland, Oregon. The libel described the device sought to be seized as a cabinet with an opening in front through which the light from an electric bulb could shine through various

colored glass slides, and alleged that the label attached to the device falsely described it as "Spectro-Chrome Metry Measurement and Restoration of the Human Radio-Active and Radio-Emanative Equilibrium (Normalation of Imbalance) by Attuned Color Waves." The libel further alleged that the device was misbranded when introduced in interstate commerce in that the printed and graphic material shipped with the article falsely described it as a cure for all the diseases of man. (R. 2–8.)

A warrant of seizure was issued (R. 10–12), and the United States Marshal took possession of the device at petitioner's home (R. 12, 32–34). Petitioner appeared in the action as claimant and moved to quash the warrant and dismiss the proceedings (Pet. 26–27). The Government and petitioner entered into a stipulation by which it was conceded that the Spectro-Chrome was shipped in interstate commerce, that it was a device within the definition of Section 201 (h) of the Act, and that its labeling was false and misleading within Section 502 (a) of the Act (R. 41–42). There was reserved for trial the question of the jurisdiction of the court to seize the device from petitioner's home (R. 43).

At the trial, petitioner testified that he had had the machine at his home about a month before its seizure (R. 100–104), that he did not intend to sell it (R. 105), that he was satisfied with the

machine (R. 106), and that he found it helpful (R. 110–112).

The district judge found as a fact that the device was shipped in interstate commerce, and that when introduced in interstate commerce its labeling was false and misleading. He also found that the article was not inherently dangerous; that it was acquired by petitioner solely for use by himself and members of his family and that it was kept in his home without intent to sell. (R. 53–56.) The judge concluded that the machine had passed beyond the channels of interstate commerce and that the Government was not entitled to seize it from petitioner's home without his consent (R. 56–57). He accordingly dismissed the proceeding and ordered the device returned to petitioner (R. 58).

On appeal, the order of the district court was reversed (R. 150), the circuit court of appeals holding that, since the device had been misbranded at the time it was introduced in interstate commerce, it was subject to seizure under Section 304 of the Act, providing that an article misbranded when introduced in interstate commerce "shall be liable to be proceeded against while in interstate commerce, or at any time thereafter" (R. 146–150).

ARGUMENT

The article here sought to be seized is concededly a device within the definition of Section

201 (h) of the act. It was concededly misbranded when introduced in interstate commerce within the meaning of Section 502 (a). It is not disputed that it could have been seized and condemned under Section 304 while it was in interstate commerce. Petitioner contends, however, that the power of seizure ceased when interstate transportation ended (Pet. 8–10) and, more particularly, that the power to condemn did not authorize seizure of the article at his home (Pet. 11–18).

1. That an article subject to condemnation under the Federal Food and Drug Act does not become immune from seizure merely because the interstate transportation of the article has come to an end was definitely decided by this Court under the 1906 Act in *Hipolite Egg Co.* v. *United States,* 220 U. S. 45. This Court there said in terms clearly applicable here, at pp. 57–58:

> The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express our-

selves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and state power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulter-

> ated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. * * *

Section 10 of the 1906 Act, 34 Stat. 771, limited the power of seizure to articles remaining "unloaded, unsold, or in original unbroken packages." However, as the *Hipolite* decision indicates, that was a statutory and not a constitutional limitation. The principle is clear that articles validly banned from interstate commerce may be followed and condemned after interstate commerce has ended.[1]

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[1] The cases of *United States* v. *Phelps Dodge Mercantile Co.*, 157 F. 2d 453 (C. C. A. 9), certiorari denied February 10, 1947, No. 812, O. T. 1946, and *Sullivan* v. *United States*, 161 F. 2d 629 (C. C. A. 5), certiorari pending, No. 121, this Term, on which petitioner relies (Pet. 9–10) have no application to this case, since they involve the problem of the right to seize goods which first became adulterated or misbranded after interstate commerce may have come to an end. *Alberty* v. *United States*, 159 F. 2d 278 (C. C. A. 9), also cited by petitioner (Pet. 9), involved the question whether the misbranding "accompanied" the interstate shipment of the article within the meaning of section 201 (m). In the present case, it is conceded that the device was misbranded at the time that it was introduced in interstate commerce.

2. The issue in this case therefore narrows down to the question whether an article misbranded when introduced into interstate commerce, and therefore subject to forfeiture, acquires immunity from condemnation when it comes to rest in a private home. Nothing in the statute itself grants such an immunity. The statute specifically provides that an article is subject to seizure while in interstate commerce "or at any time thereafter," with no qualification. Petitioner in effect argues, however, that the Fourth and Fifth Amendments to the Constitution require that such an exception be read into the statute. He argues that to take the property from his home is to invade the right of privacy guaranteed by the Fourth Amendment and to deprive him of property in violation of the Fifth Amendment.

Petitioner's contentions, however, overlook the fact that the device here sought to be condemned came into his possession only through the violation of a concededly valid federal statute. The moment the article was introduced into interstate commerce in misbranded form it became an outlaw of commerce, an article whose confiscation or destruction is the special concern of the law. See *Hipolite Egg Co.* v. *United States, supra; McDermott* v. *Wisconsin,* 228 U. S. 115, 128. It thus became an article in the same class as lottery tickets, narcotics, illicit liquor, etc., an article subject to forfeiture, which could be taken by the Government wherever found. And since there is

no property right protected by the Constitution in articles made contraband by a valid law (see *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132, 140), the taking of the property was not a taking in violation of the Fifth Amendment.

Nor does the seizure of the property here violate any right guaranteed by the Fourth Amendment. Nothing in the Fourth Amendment prevents the United States from seizing contrabrand in a home or in any other place. As this Court said in the leading case of *Boyd* v. *United States,* 116 U. S. 616, 623, "The search for and seizure of stolen or forfeited goods * * * are totally different things from a search for and seizure of a man's private books and papers." The property taken was property which should never have come into petitioner's possession through interstate channels. It was taken through valid judicial process issued under a valid federal law.[2] The Fourth Amendment no more prohibits the execution of such process than it prohibits a levy of goods under a civil attachment. See *Boyd* v. *United States,* 116 U. S. 616, 624; *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272.

Petitioner's further contention that the taking of the machine deprived him of his liberty to use his own method of cure similarly ignores the basic fact that the article which he seeks to retain

[2] Petitioner speaks of forcible seizure of the article (Pet. 2, 13). The record shows, however, that the seizure was peacefully made pursuant to the warrant (R. 32–34).

is an article outlawed under a valid federal statute. He may use as a method of cure any device which he can properly obtain, but he cannot, on the basis of such right, retain an article which was shipped contrary to the provisions of a statute representing a proper exercise of the federal power over commerce. As this Court said in *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 320, involving the power of a State to enact a prohibition law:

> Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use were permitted.

The seizure of any illicit food, drug, or device restricts the right of all those who would choose to use such article, but this is no valid objection. The liberty safeguarded under the Constitution is not an absolute or uncontrollable liberty; "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391.

CONCLUSION

The decision below is correct in holding that the seizure from a home of an article illegally

shipped in violation of the Federal Food, Drug and Cosmetic Act violates no constitutional rights. It represents merely the application to a particular set of facts of principles firmly established by the decisions of this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947